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No. 06-38

Supreme Court, U.S.
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In the
Supreme Court of the United States

Detroit Entertainment, LLC,
d/b/a Motor City Casino, and
Marlene Brown,

Petitioners,

v

Stella Romanski.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATE OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

I. When a State delegates to a private person a function that is traditionally reserved exclusively to the State, the private person is deemed a public actor for purposes of 42 USC 1983 actions. Here, the State of Michigan licenses private security officers to enable the officers to make misdemeanor arrests committed in their presence – a right that is similar to the shopkeeper's privilege, which allows a merchant to arrest for misdemeanor retail frauds that occur in the merchant's store. Where the common law and statutory law also allow citizens to arrest for felonies, did the Sixth Circuit Court of Appeals err in concluding that the State's licensure transformed private security officers into State police officers under Section 1983?

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INTEREST OF THE AMICUS CURIAE

The Attorney General of Michigan serves as the chief law enforcement officer for the State and, under Michigan law, has authority to appear in cases to vindicate the interests of the people of the State. The Sixth Circuit Court of Appeals decision in *Romanski v Detroit Entertainment* has undermined the value of the licensing scheme established by the Michigan Legislature for private security officers hired by private employers, a decision that will have an adverse effect for the safety of hospitals and schools in Michigan in addition to casinos, and will increase the burden on local police agencies to protect the safety of our citizens.[1] Consequently, the Michigan Gaming Control Board has asked the Attorney General to file an amicus brief. The Attorney General has been in contact with private employers on this subject, including schools and malls, about the chilling effect this decision may have on the use of the licensure provisions, thereby inhibiting the ability of private employers to guarantee the safety of people within their facilities.

In the licensure provisions of MCL 338.1051 *et seq* ("Public Act 330"), the State of Michigan affords a private employer – hospitals, schools, malls, and casinos – the opportunity to hire private security officers and license them so that the security personnel will have the right to arrest without a warrant while on the employer's premises. For example, one of the largest hospitals in Grand Rapids, Spectrum Health, has licensed private security officers under Public Act 330. The authority conferred by Public Act 330 is the same basic right as is provided in the common law shopkeeper's privilege, but applied to other private employers that are not merchants. By statute and at common law, the right to arrest is a right that has been shared by police officers and civilians. It is not an exclusive power reserved to public actors.

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[1] *Romanski v Detroit Entertainment*, 428 F3d 629 (2005).

By concluding that this licensure provision transforms these private security officers into "State actors" subject to punitive damages under 42 USC 1983, the Sixth Circuit overlooked the fact that the Michigan statute is merely conferring the same basic limited authority on private citizens as is provided by the shopkeeper's privilege. This decision may well negate the practical value of the licensure provision, because private employers will not avail themselves of the provision since they will not wish to subject themselves to punitive damages in Section 1983 actions. Consequently, the burden on policing this kind of crime in hospitals, schools, malls, sports facilities, transportation facilities, and, in this case, casinos, will then fall onto an already overburdened local police agency. This Court should grant the petition for certiorari.

REASONS FOR GRANTING THE PETITION

I. The licensing of a private security officer, providing that officer authority to arrest for misdemeanors, does not make that private person a "state actor."

A. Public Act 330 merely confers the same basic authority to arrest as already exists for the merchant under the common law and Michigan statutory law.

The Michigan Legislature enacted the Private Security Business and Security Act in 1968 (known as "Public Act 330") to regulate private security personnel for the safety of the general public.[2] The primary provision of this Act for arrest powers is the provision that grants licensed private security police officers the same authority to arrest as public police officers, namely the authority to arrest for misdemeanors[3]:

> A private security police officer, as described in section 29, who is properly licensed under this act has the authority to arrest a person without a warrant as set forth for public peace officers in section 15 of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.15, when that private security police officer is on the employer's premises. Such authority is limited to his or her hours of employment as a private security police officer and does not extend beyond the boundaries of the property of the employer and while the private security police officer is in the full uniform of the employer.

The basic police arrest provision for police officers ("peace officers"), MCL 764.15, lists the different circumstances in

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[2] MCL 338.1051 *et seq.*

[3] MCL 338.1080.

which a police officer may arrest without a warrant; this list includes misdemeanors committed in the officer's presence and also includes certain kinds of misdemeanors where the officer has reasonable cause to arrest but where the crimes were not committed in the officer's presence, e.g., domestic violence.[4]

Public Act 330 only increases the authority of a private security officer to arrest above that of an ordinary citizen in one circumstance – the right to arrest for misdemeanors. This grant of authority is then circumscribed by two conditions: (1) by location – it is limited to the employer's premises; and (2) by time – it is limited by the employee's actual working hours.

This same basic authority to arrest as conferred by Public Act 330 is already granted by common law and by statute to merchants. Under the common law, as codified by Michigan statutory law, all citizens have the right to arrest for a felony either committed in their presence or where that felony was committed outside of their presence.[5] The shopkeeper's common law privilege, moreover, allows a private citizen who is a merchant or the agent of a merchant to detain a person for the theft of merchandize inside the store.[6] In Michigan, under MCL 764.16(d), the merchant or the merchant's agent has the authority to arrest for shoplifting, which includes the authority to arrest for these misdemeanors not committed in the person's presence:

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[4] MCL 764.15.

[5] 5 Am Jur 2d Arrest § 57 (felony committed in citizen's presence); 5 Am Jur 2d Arrest § 58 (felony committed outside of citizen's presence); MCL 764.16(1), (2). See also *Maliniemi v Gronlund*, 92 Mich 222, 227; 52 NW 627 (1892) ("A private person has a right to arrest a man on suspicion of felony without a warrant") and *People v McLean*, 68 Mich App 480, 485-486; 36 NW2d 231 (1976).

[6] See 5 Am Jur 2d Arrest § 59 ("This common law right of a merchant to detain suspected shoplifters is recognized by several jurisdictions").

> If the private person is a merchant, an agent of a merchant, an employee of a merchant, or an independent contractor providing security for a merchant of a store and has reasonable cause to believe that the person to be arrested has violated section 356c [retail fraud first degree] or 356d [retail fraud second degree] of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.356c and 750.356d of the Michigan Compiled Laws, in that store, *regardless of whether the violation was committed in the presence of the private person.* [Emphasis added.]

In other words, Michigan law by statute allows the private security personnel for a merchant the authority to arrest for misdemeanor retail fraud.[7] Other states provide the same basic right of merchants to detain in these circumstances.[8] Corresponding to this authority, the State of Michigan limits liability by excluding punitive damages and damages for mental anguish in a suit for unlawful arrest and false imprisonment for a merchant or agent of a merchant where that person has probable cause to believe that the patron was committing retail fraud.[9]

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[7] Second-degree retail fraud is a misdemeanor in Michigan under MCL 750.356d.

[8] Ala Code § 15-10-14; Ariz Rev Stat Ann § 13-1805(C)-(D); Ark Code Ann §§ 5-36-116(a); Cal. Penal Code § 490.5(f); Conn Gen Stat Ann § 53a-119a; Fla Stat Ann § 812.015(3)-(5); Idaho Code Ann § 48.704; 720 Ill Comp Stat Ann § 16-A-5; Ind Code § 35-33-6-2; Iowa Code Ann § 808.12; Kan Stat Ann § 21-3424(c); Ky ev Stat Ann § 433.236; La Code Crim Proc, art 215; Me Rev Stat Ann § 3521; NM Stat Ann § 30-16-23; Nev Rev Stat § 597.850(3); 22 Okl St § 1343; Or Rev Stat § 131.655; RI Gen Laws § 11-41-21; Tenn Code Ann § 40-7-116; Utah Code Ann § 77-7-12; Va Code Ann § 18.2-105.1; Wis Stat § 943.50(3); W Va Code § 61-3A-4.

[9] MCL 600.2917.

Consistent with this fact, in *City of Grand Rapids v Impens,* the Michigan Supreme Court examined the question whether private security personnel regulated under Public Act 330 were "state actors" who were required to give *Miranda* warnings when they took a person suspected of criminal activity into custody, searched him, and then interrogated him.[10] The Court rejected the contention that this was state action by concluding that the security personnel were not acting as "police agents," but rather that their "role may be viewed as an extension of the common-law shopkeepers' privilege to detain for a reasonable period of time a person suspected of theft or failure to pay."[11] This is right. Public Act 330 merely extends the right of arrest from merchants to private employers who may encounter small level crime that private security officers may most easily address, i.e., expanding the right from merchants to private security in schools, hospitals, and malls.

For these same reasons, the Michigan Supreme Court in *Impens* ultimately concluded that there was no state action in that case[12]:

> Defendant believes that the licensing statutes which regulate private security guards demonstrate the requisite degree of state action to bring their activities under color of state law, subject to constitutional restraints. We disagree. We do not believe that the mere licensing of security guards constitutes sufficient government involvement to require the giving of *Miranda* warnings.

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[10] *City of Grand Rapids v Impens,* 414 Mich 667, 671; 327 NW2d 278 (1982).

[11] *Impens,* 414 Mich at 675.

[12] *Impens,* 414 Mich at 676.

The Court then determined that the security personnel were under no obligation to provide *Miranda* to the person they had placed in custody.

B. The Sixth Circuit Court of Appeals failed to recognize that the limited authority to arrest conferred on these private emplc 'ers was not a right that was historically reserved exclusively to the State.

This Court has held that where the State delegates a function that has traditionally been reserved exclusively by the State to a private party, this private party is deemed a state actor.[13] This Court has not previously determined whether a private security officer licensed to make misdemeanor arrests is state actor when acting on this authority.

In *Romanski,* in examining whether private security officers were state actors under 42 USC 1983, the Court of Appeals determined that private security officers were serving a "public function" by exercising powers that were traditionally reserved to the State.[14] In reviewing the case law, the Court of Appeals then concluded that Petitioner Gloria Brown was a "state actor as a matter of law" because she exercised "plenary" police power since she was authorized to make arrests at her discretion and for any offense.[15] But a citizen has always had the authority at common law – and supplemented by Michigan

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[13] See *Flagg Bros. v Brooks,* 436 US 149, 157-158 (1978); *Jackson v Metropolitan Edison Co,* 419 US 345, 352-353 (1974).

[14] *Romanski,* 428 F3d at 636.

[15] *Romanski,* 428 F3d 629.

statutory law – to arrest at that citizen's discretion for any felony offense.[16]

The Court of Appeals ruled that the private security officers here were "de facto police officers." This is not true.

The authority to arrest for misdemeanors committed in one's presence is not the cornerstone of state arrest authority. The right to arrest is not reserved exclusively to the State.[17] Moreover, at common law, the law even recognized the authority of civilians to arrest for the "breach of the peace," which would include misdemeanors.[18] In brief, the arrest function has historically been shared between police officers and ordinary citizens.

In this case, the fact that Public Act 330 licensed private security officers and thereby expanded their authority from making felony arrests to also making misdemeanor arrests committed in their presence did not make these private security personnel State actors. They were given the same basic authority to arrest as has been conferred on merchants and their agents. This is not an exclusive public function.

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[16] In fact, the Michigan Supreme Court has recognized the superior authority of a civilian to use lethal force to stop a fleeing felon than a police officer, because the civilian is not constrained by the Fourth Amendment. *People v Couch*, 436 Mich 414, 417; 461 NW2d 683 (1990) (affirming the common law rule that a citizen has the authority to use lethal force to stop a nondangerous fleeing felon).

[17] See *Romanski*, 428 F3d at 651 (Farris, dissenting)("Romanski has presented no evidence that the State of Michigan has traditionally and exclusively reserved the power to make warrantless arrests. To the contrary, the Michigan Supreme Court has held that licensed private security guards do not act as state actors in detaining shoplifting suspects").

[18] 5 Am Jur 2d Arrest § 57.

II. The Court of Appeals' decision concluding that private security officers are subject to Section 1983 actions has undermined Public Act 330 because private employers will be discouraged from licensing its employees through this Act and, consequently, local police agencies will have to regulate these facilities.

Currently, the private employers who have licensed private security officers under PA 330 include hospitals, schools, and malls. The fact that the licensing scheme will now subject the private employer to punitive damages under 42 USC 1983 actions will discourage these employers from exercising their statutory right to make arrests under MCL 338.1080. As a concrete example of this point, in the aftermath of this ruling, several employers, including the Motor City Casino and MGM Grand Detroit Casino, both in Detroit, no longer certify their security officers for arrest powers through Public Act 330 for fear of liability under Section 1983. And three of the largest health care facilities in the State – Detroit Medical Center, Henry Ford Hospital, and St. John Hospital & Medical Center – maintain licensed security officers under Public Act 330.

Contrary to the legislative intent underlying Public Act 330, the *Romanski* decision may have the ironic effect of reducing the oversight of Michigan State Police and other State agencies over private security personnel and may also reduce the safety of these facilities. The private employers may decide to forgo the burden of using the licensing provision – with its requirement of training and other oversight obligation under MCL 338.1081 – and elect to merely rely on their statutory and common law right to arrest offenders.

Moreover, because the majority of the private employers who license under Public Act 330 are located in Detroit, the lion's share of the burden of policing these facilities will fall to the City of Detroit Police Department and the Michigan State Police. The *Romanski* decision comes at a time when the Michigan economy has been sluggish, and local police agencies have seen reductions in personnel. In fact, the Michigan Commission on Law Enforcement Standards reported in July 2006 that the number of local police officers statewide had reduced from 23,150 in 2001 to 21,681 officers, a reduction of more than 1400 officers statewide. The responsibility for responding to misdemeanor criminal activity in the casinos and in hospitals, schools, and malls will become or remain the obligation of the Detroit Police Department or some other overburdened local police agency.

Given the limited resources available to local police agencies, the public is better served by allowing well-trained private security officers on hand with misdemeanor-arrest powers to respond to this kind of minor crime than by having the local police agency send a police vehicle to every kind of disorderly conduct matter that arises. This power to arrest is not an exclusive police function. The same policy justification underlying Public Act 330 supports the basis for the shopkeeper's privilege – the private security personnel on hand is often in the best position to prevent the criminal from walking away.[19] This Court should grant leave and correct the misguided decision of the Court of Appeals.

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[19] See 5 Am Jur 2d Arrest § 59.

CONCLUSION

Wherefore, the State of Michigan asks this Court to grant the petition for certiorari.

Respectfully submitted,

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